

**Report to the Twenty-Second Legislature
State of Hawai‘i
2003**

**Recovering Hawai‘i’s Unique and Imperiled Flora and Fauna:
A Discussion on Habitat Conservation Plans and Safe Harbor Agreements
(Pursuant to HCR 103, 2002)**

**Prepared by
State of Hawai‘i
Environmental Council
January 2003**

Introduction

The discussion below aims to further the goals of protecting and promoting the recovery of Hawai'i's unique and imperiled flora and fauna as requested by HCR 103, 2002 (Appendix A).

A working group (Appendix B) met and reviewed three potential bills to amend Hawaii Revised Statutes Chapter 195D. The three proposals are:

- 1) Compromise Proposal - a compromise bill drafted and sent to Conference Committee at the end of last year's legislative session by the Department of Land and Natural Resources and various environmental groups (Appendix C);
- 2) Earthjustice Proposal - a bill prepared by Earthjustice (Appendix D); and
- 3) Department of Land and Natural Resources Proposal - a bill prepared by the Department of Land and Natural Resources (Appendix E).

After reviewing the three bills, the working group discussed and analyzed five major questions concerning Hawai'i's endangered species law. The questions are:

- 1) Should Habitat Conservation Plans and Safe Harbor Agreements be allowed on public lands?
- 2) Should Legislative approval be required before the Board of Land and Natural Resources may enter into a Habitat Conservation Plan or Safe Harbor Agreement which was recommended for disapproval by the Endangered Species Recovery Committee?
- 3) Should citizen suits be allowed against state and county agencies for violations of Habitat Conservation Plans, Safe Harbor Agreements, and other provisions of chapter 195D, HRS?
- 4) Should the Department of Land and Natural Resources be allowed to impose new requirements or conditions for Habitat Conservation Plans or Safe Harbor Agreements on private lands that are found to be appreciably reducing the likelihood of the survival or recovery of endangered and threatened species?
- 5) Should the Endangered Species Recovery Committee conduct at least one site visit to each property that is the subject of a proposed Habitat Conservation Plan or Safe Harbor Agreement?

The working group members presented diverse viewpoints on all the questions. In order to present their concerns to the legislature, the group decided to list the subjective opinions of the various individual working group members. These "opinions in favor" and "opinions against" do not constitute a consensus statement by the working group.

Question #1: Should Habitat Conservation Plans and Safe Harbor Agreements be allowed on public lands?

Opinions in Favor

- 1) The extension of the law to allow Safe Harbor Agreements and Habitat Conservation Plans on public lands encourages government agencies and lessees of public lands to implement management practices that may benefit endangered species.
- 2) The extension of the law to allow Safe Harbor Agreements and Habitat Conservation Plans on public lands allows government agencies and lessees to take proactive steps to improve the condition of endangered species habitat despite existing or future land use conflicts.
- 3) The extension of the law to allow Safe Harbor Agreements and Habitat Conservation Plans on public lands will eliminate the necessity of defining project-specific exceptions as in the current statute.
- 4) Allowing Safe Harbor Agreements and Habitat Conservation Plans on public lands without requiring special legislative approval in each instance is consistent with the Legislature's standard practice of giving administrative agencies the power to exercise administrative discretion. It enables the Department of Land and Natural Resources to balance competing public interests in how public land is used.

Opinions Against

- 1) If Habitat Conservation Plans and Safe Harbor Agreements are allowed on public lands without adequate oversight, government agencies may compromise the health of endangered species to further other goals. Checks and balances such as authorizing citizen suits and requiring affirmative legislative approval of Habitat Conservation Plans and Safe Harbor Agreements rejected by the Endangered Species Recovery Committee should be part of the new law to prevent government abuses that would threaten Hawai'i's imperiled species with extinction.
- 2) Unlike private parties, government agencies already have a statutory duty under Chapter 195D to carry out programs to protect threatened and endangered species. Accordingly, there is no need to provide government agencies with incentives such as Safe Harbor Agreements and Habitat Conservation Plans to encourage them to take proactive steps to benefit threatened and endangered species.

Comments by the University of Hawai'i:

- 1) If Habitat Conservation Plans or Safe Harbor Agreements are allowed on public lands, two sub-issues must be addressed:
 - (a) whether "public" Habitat Conservation Plans or Safe Harbor Agreements are treated differently from or the same as "private" Habitat Conservation Plans or Safe Harbor Agreements for matters such as the approval process (e.g., whether subsequent legislative approval is required) or the substantive content of the Habitat

Conservation Plans or Safe Harbor Agreements (such as period of the agreement, and who bears risk of extraordinary events); and

- (b) assuming there is a rational basis to treat public Habitat Conservation Plans or Safe Harbor Agreements differently from private Habitat Conservation Plans or Safe Harbor Agreements, how is this distinction between "public" and "private" determined and implemented--for example, is it the status of the fee owner, or the status of the developer, or the status of the funds used for development, or the status of the predominant end user of the land which determines whether the Habitat Conservation Plan is "public" or "private."
- 2) In addition, under the definition of "Government-owned lands" in the Department of Land and Natural Resources draft, the University is concerned that the definition of "government-owned lands" is too narrow a definition and suggests the following revisions to the text (as underlined below). "Government-owned lands" means lands owned by the State or any agency thereof, or lands owned by any political subdivision of the State, along with lands owned by, or set-aside for, the University of Hawaii."

Question # 2: Should Legislative approval be required before the Board of Land and Natural Resources may enter into a Habitat Conservation Plan or Safe Harbor Agreement which was recommended for disapproval by the Endangered Species Recovery Committee?

Opinions in Favor

- 1) If the expert biologists on the Endangered Species Recovery Committee conclude that a proposed Habitat Conservation Plan or Safe Harbor Agreement will harm endangered and threatened species, the decision to go forward with the proposal implicates significant public policy trade-offs (i.e., protecting endangered species vs. other societal goals) that are best left to the people of Hawai‘i, through their elected representatives, to resolve, rather than an appointed board.
- 2) Since it should only be in rare cases that the Board proposes to enter into a Habitat Conservation Plan or Safe Harbor Agreement for which the Endangered Species Recovery Committee has recommended disapproval (this has not happened in the five years that the law allowing Habitat Conservation Plans and Safe Harbor Agreements has been on the books), requiring legislative approval would not involve the Legislature in micro-management of species recovery efforts.
- 3) Requiring legislative approval for projects the Endangered Species Recovery Committee has found to be unwise from an endangered species standpoint would provide an important check against abuses of the Board’s authority to enter into Habitat Conservation Plans and Safe Harbor Agreements.
- 4) Legislative approval of Habitat Conservation Plans or Safe Harbor Agreements that the Endangered Species Recovery Committee has concluded would harm listed species should be required for all such projects regardless of whether they are proposed to be carried out on public or private land. Hawai‘i’s endangered and threatened species are public trust resources that deserve the same degree of protection wherever they are found.
- 5) Alternate proposals to require the Legislature affirmatively to disapprove, in its next session, of Board approvals made over the Endangered Species Recovery Committee’s objections would not provide adequate protection to Hawai‘i’s unique and imperiled plants and animals. With the huge volume of proposed legislation in each session, bills are routinely deferred for a host of reasons unrelated to their merits. Requiring affirmative disapproval in the next legislative session risks allowing ill-conceived projects to push our native species to extinction – losing valuable public trust resources forever – with no meaningful oversight by the Legislature.

Opinions Against

- 1) Development of Safe Harbor Agreements and Habitat Conservation Plans already proceeds under substantial guidance and scrutiny including mandatory review by the Endangered Species Recovery Committee. Therefore, legislative review should not apply to agreements and plans on private lands because it unnecessarily adds uncertainty and complexity to the process and thus decreases the incentive for private landowners to

cooperate. Adding legislative approval to the process could add up to 18 months to the planning stages of affected projects.

- 2) Alternate proposals to require the Legislature affirmatively to disapprove, in its next session, of Board approvals made over the Endangered Species Recovery Committee's objections is preferable to the legislative approval alternative. Requiring legislative approval could lead to the delay or rejection of an otherwise valid plan or agreement, simply by the Legislature's failure to act.
- 3) Private landowners strongly oppose imposition of legislative review of agreements affecting private lands.
- 4) Requiring prior legislative approval would increase delays and costs and so deter voluntary private participation in a program which depends on voluntary participation.

Question #3: Should citizen suits be allowed against state and county agencies for violations of Habitat Conservation Plans, Safe Harbor Agreements, and other provisions of chapter 195D, HRS?

Opinions in Favor

- 1) Checks and balances are vital to ensure that Habitat Conservation Plans and Safe Harbor Agreements serve their intended purpose: to promote the conservation of listed species. Citizen suits are an effective tool to ensure that public agencies abide by their agreements and comply with their duty to protect Hawai'i's critically imperiled species.
- 2) Without citizen suits, the fox would be guarding the henhouse, with the Department of Land and Natural Resources responsible for ensuring its own compliance with the many Habitat Conservation Plans and Safe Harbor Agreements it proposes to undertake.
- 3) Under a citizen suit provision, concerned citizens could bring suit to enforce only the priorities that the Legislature has established through statute; they cannot use the process to further any agenda other than the one that the people of Hawai'i, through their representatives, have endorsed.
- 6) Under the federal Endangered Species Act, citizens already have the right to sue to protect listed fish and wildlife. Amending Chapter 195D to allow citizen suits against public agencies would ensure that Hawai'i's nearly 300 endangered and threatened plants receive similar protection against destructive government projects.
- 7) Nearly 30 years of experience with the federal Endangered Species Act's citizen suit provision has demonstrated that citizens use the right to sue responsibly.
- 8) History proves that the prospect of citizen lawsuits would not dissuade landowners from entering into Safe Harbor Agreements that might benefit listed species. Notably, all of the Safe Harbor Agreements that the Board of Land and Natural Resources has approved to date involve listed birds, which citizens currently can sue to protect under the federal Endangered Species Act.
- 9) Limiting Chapter 195D's citizen suit provision to actions against state and county agencies would fully address private landowners' desire to avoid additional potential legal liability.
- 10) To avoid a situation in which entering into an Habitat Conservation Plan or Safe Harbor Agreement would subject public agencies to additional oversight, it is vital that citizens be authorized to bring suit for agency violations of any provision of Chapter 195D. Otherwise, the Legislature risks giving agencies an incentive to ignore their legal duties under Chapter 195D entirely, rather than seek incidental take authorization under a Habitat Conservation Plan or Safe Harbor Agreement.

Opinions Against

- 1) Permitting citizen suits forces the state to manage endangered species according to special interest groups with the resources to litigate rather than according to the needs of the resources as mandated by law.
- 2) Although, citizen suits can only be brought against government agencies, such suits would divert limited resources from those agencies and impose long delays on approving projects of private landowners.
- 3) The allowance of citizen lawsuits would discourage participation in the Habitat Conservation Plan and Safe Harbor Agreement process, and be contrary to the original intent of the legislation, which is to encourage conservation and recovery of threatened and endangered species.
- 4) Chapter 195D already provides adequate safeguards (content requirements, Endangered Species Recovery Committee review, public review, annual reporting, opportunity for an annual site visit, language for termination, enforcement, etc.) to ensure the proper implementation of the Habitat Conservation Plan and Safe Harbor Agreement measures.
- 5) Should citizen suits be allowed, government projects could be further delayed by lawsuits that stall the processing of a Habitat Conservation Plan or Safe Harbor Agreement.
- 6) The fear of lawsuits and associated uncertainties over delays in the process may make obtaining an Habitat Conservation Plan or Safe Harbor Agreement less attractive to landowners and may deter some from participating.
- 7) Public and private fiscal resources, which would otherwise be directed towards the threatened and endangered conservation and recovery objectives, would be diverted towards litigation.

Question #4: Should the Department of Land and Natural Resources be allowed to impose new requirements or conditions for Habitat Conservation Plans or Safe Harbor Agreements on private lands that are found to be appreciably reducing the likelihood of the survival or recovery of endangered and threatened species?

Opinions in Favor

- 1) Amending Chapter 195D's "no surprises" provision is necessary to clarify that DLNR retains the authority to ensure that activities authorized under an HCP or SHA will not push listed species to extinction. The current "no surprises" provision - which arguably precludes DLNR from modifying the terms of an HCP or SHA, even if necessary to prevent extinction - was enacted in 1997, based on federal policy that provided assurances to the HCP or SHA permit holder that no additional land use restrictions or financial compensation will be required of the permittee. The U.S. Fish and Wildlife Service subsequently enacted that policy as a regulation. At the same time, the FWS amended its HCP and SHA permit regulations to clarify that FWS may revoke an HCP or SHA permit, if continuation of the permitted activity would appreciably reduce the likelihood of a listed species' survival and recovery. See 50 C.F.R. section 17.22(b)(8), (c)(7) (regulations for revoking HCP and SHA permits for endangered species); 50 C.F.R. section 17.32 (b)(8) and (c)(7) (regulations for revoking HCP and SHA permits for threatened species). Amending Chapter 195D to allow DLNR to impose new requirements or conditions in the unusual circumstances where continuing the permitted activity would appreciably reduce the likelihood of the survival or recovery of endangered and threatened species would provide assurances similar to those under current federal law that HCPs and SHAs will not push species to extinction. The proposed amendment would give the landowner the choice of either accepting the new requirements, or ceasing activities under the HCP or SHA.
- 2) History proves that amending Chapter 195D's "no surprises" provision would not dissuade landowners from entering into Safe Harbor Agreements that might benefit listed species. Notably, all of the Safe Harbor Agreements that the Board of Land and Natural Resources has approved to date involve listed birds, to which FWS' new "no surprises" policy applies.
- 1) The same "no surprises" policy should apply to all listed species, regardless of whether the Habitat Conservation Plan or Safe Harbor Agreement in question involves public or private land. Hawai'i's endangered and threatened species are public trust resources that deserve the same degree of protection wherever they are found.

Opinions Against

- 1) The primary goal of Safe Harbor Agreements is to encourage landowners to carry out actions that benefit endangered species. If landowners cannot be assured that they will not incur additional costs for carrying out such actions, there will be less incentive for landowners to participate in the program. Therefore, the responsibility for implementing any additional mitigation measures required due to extraordinary new circumstances should remain with the state. The current Chapter 195D wording is consistent with the federal "no surprises" policy which says that the Service won't demand additional land

use restrictions or financial compensation from the permit holder if unforeseen circumstances call for additional mitigation after the permit is issued.

- 2) The proposed legislation would leave a landowner subject to additional requirements that were not anticipated when the landowner entered into the agreement.
- 3) Chapter 195D's current "no surprises" provision, far from being a repudiated policy, is consistent with current Federal regulations, which require a permittee's consent to additional restrictions or commitment of resources under a Habitat Conservation Plan or Safe Harbor Agreement. See 50 C.F.R. sec. 17.22 (additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or additional restrictions without the consent of the permittee). Under the federal regulations, the government can unilaterally impose additional burdens to deal with changed circumstances only if the government pays all additional costs. See 50 CFR § 17.22(b)(5), (b)(6), c(5), (c)(6), (d)(5), (d)(6).
- 4) The issue is not whether there can be additional mitigation measures if needed to preserve the species but who should pay. The point of a "safe harbor" agreement is that it's safe. A private owner who voluntarily cooperates should be able to rely on the government to keep its word. The government should not impose unexpected burdens on people because they agreed to cooperate. If preserving the species does generate public benefits because the species are public trust resources, then the public should pay for the benefits it receives.

Question #5: Should the Endangered Species Recovery Committee conduct at least one site visit to each property that is the subject of a proposed Habitat Conservation Plan or Safe Harbor Agreement?

Opinions in Favor

- 1) Without conducting at least one site visit to property that is the subject of a proposed Habitat Conservation Plan or Safe Harbor Agreement, it is impossible for the Endangered Species Recovery Committee to make an informed decision regarding whether the Habitat Conservation Plan or Safe Harbor Agreement would satisfy the statutory requirement to provide a net benefit to the species in question.
- 2) Requiring at least one site visit to each property that is the subject of a proposed Habitat Conservation Plan or Safe Harbor Agreement would not impose an unreasonable burden on landowners. Landowners should understand the importance of such a site visit to allow the Endangered Species Recovery Committee to evaluate the merits of the proposal.
- 3) Requiring at least one site visit to each property that is the subject of a proposed Habitat Conservation Plan or Safe Harbor Agreement would not unduly burden the Endangered Species Recovery Committee since it reviews only a few such proposals each year. In the five years that the law allowing Habitat Conservation Plans and Safe Harbor Agreements has been on the books, only a handful of projects have been submitted to the Endangered Species Recovery Committee for review.

Opinions Against

- 1) The lack of limit to the number of site visits that can be conducted raises the concerns among landowners of over policing of a Habitat Conservation Plan or Safe Harbor Agreement site.
- 2) The Recovery Committee should retain its present discretion to make site visits as it sees fit (but not more than one per year).
- 3) It is questionable whether the Endangered Species Recovery Committee, a voluntary committee, can make the site visit mandate and meet other requirements as the number of Safe Harbor Agreement and Habitat Conservation Plan applications and sites increase.

Appendix A
House Concurrent Resolution

House Concurrent Resolution 103 HD1 SD1, 2002

REQUESTING THE STATE ENVIRONMENTAL COUNCIL, THE DEPARTMENT OF LAND AND NATURAL RESOURCES, SIERRA CLUB, HAWAII CHAPTER, LAND USE RESEARCH FOUNDATION, CONSERVATION COUNCIL OF HAWAII, ESTATE OF JAMES CAMPBELL, EARTHJUSTICE LEGAL DEFENSE FUND, UNIVERSITY OF HAWAII, DEPARTMENT OF AGRICULTURE, DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT, AND TOURISM, AND OTHER INTERESTED PARTIES, TO ANALYZE POTENTIAL AMENDMENTS TO HAWAII'S ENDANGERED SPECIES LAW, CHAPTER 195D, HAWAII REVISED STATUTES, TO FURTHER THE GOALS OF PROTECTING AND PROMOTING THE RECOVERY OF HAWAII'S UNIQUE AND IMPERILED FLORA AND FAUNA.

WHEREAS, Hawaii has been referred to as the "endangered species capital of the world"; and

WHEREAS, Hawaii is home to over 300 endangered and threatened species; and

WHEREAS, once an endangered species is pushed to extinction, it represents an irreparable loss to both Hawaii's natural heritage and the Earth's biodiversity; and

WHEREAS, in 1997, the Legislature amended chapter 195D, Hawaii Revised Statutes, to provide private landowners with incentives to promote the conservation and recovery of threatened and endangered species and their habitats; and

WHEREAS, after five years of experience with the 1997 amendments, it is appropriate and necessary to evaluate how effective the amendments are to serve chapter 195D's fundamental goal of enhancing the prospects for survival and recovery of Hawaii's imperiled flora and fauna; and

WHEREAS, a working group should be established to examine potential amendments to chapter 195D, Hawaii Revised Statutes, to further the goals of protecting and promoting the recovery of Hawaii's unique and imperiled flora and fauna; now, therefore,

BE IT RESOLVED by the House of Representatives of the Twenty-first Legislature of the State of Hawaii, Regular Session of 2002, the Senate concurring, that the State Environmental Council (SEC), Department of Land and Natural Resources, Sierra Club, Hawaii Chapter, Land Use Research Foundation, Conservation Council of Hawaii, Estate of James Campbell, Earthjustice Legal Defense Fund, University of Hawaii, Department of Agriculture, Department of Business, Economic Development, and Tourism, and other interested parties, are requested to form a working group to discuss and analyze potential amendments to Hawaii's endangered species law, chapter 195D, Hawaii Revised Statutes, to further the goals of protecting and promoting the recovery of Hawaii's unique and imperiled flora and fauna; and

BE IT FURTHER RESOLVED that this working group address the issues of conservation of threatened or endangered species on public lands; and

BE IT FURTHER RESOLVED that the SEC is requested to report to the Legislature on the progress and recommendations of the working group no later than 20 days before the convening of the Regular Session of 2003; and

BE IT FURTHER RESOLVED that certified copies of this Concurrent Resolution be transmitted to the Chairperson of the SEC, Chairperson of the Board of Land and Natural Resources, Director of the Sierra Club, Hawaii Chapter, Executive Director of the Land Use Research Foundation, Executive Director of the Conservation Council of Hawaii, Chief Executive Officer of the Estate of James Campbell, Managing Attorney of the Honolulu office of the Earthjustice Legal Defense Fund, the President and the Chairperson of the Board of Regents of the University of Hawaii, the Chairperson of the Board of Agriculture, and the Director of Business, Economic Development, and Tourism.

Appendix B
Working Group Members

Working Group Members

Alan Gottlieb, O‘ahu Cattlemans Association
Arnold Lum, Environmental Council
Bill Standley, Department of Land and Natural Resources
David Henkin, Earthjustice
Frederic Berg, Department of Hawaiian Homelands
Grant Murakami, PBR Hawai‘i
Henry Eng, Campbell Estate
Janet Ashman, Hawai‘i Agriculture Research Center
Jeyan Thirugnanam, Office of Environmental Quality Control
John Harrison, UH Environmental Center & Endangered Species Recovery Committee
Mashuri Waite, Conservation Council Hawai‘i
Mike Faye, Environmental Council
Patrick W. Hanifin, Pacific Legal Foundation
Paul Conry, Department of Land and Natural Resources
Paul Schwind, Land Use Research Foundation
Wayne Yoshioka, Parsons Brinckerhoff

Appendix C
Compromise Proposal

Compromise Proposal

SECTION 1. Section 195D-2, Hawaii Revised Statutes, is amended by amending the definition of “landowner” to read as follows:

““Landowner” means ~~[the owner of the fee simple interest in private land; and may include public lands limited to the following projects:~~

~~(1) North-South Road, Ewa, Oahu, project no. HWY-0-01-92 as described in the draft environmental assessment, September 1998; and the project described as Kapolei Parkway, Ewa, Oahu, project no. E-13 of the Oahu Regional Transportation Plan adopted by the Oahu metropolitan planning organization on April 6, 2001;~~

~~(2) Cyanotech Corporation, incidental take permit and habitat conservation plan as described in the Federal Register, January 2, 2002 (volume 67, number 1); and~~

~~(3) Kealahou planned community proposed by the housing and community development corporation of Hawaii and the department of Hawaiian home lands on lands within tax map key numbers 7-4-8: parcel 17, 7-4-8: portion 12, 7-4-8: parcel 43, and 7-4-19: portion 43.]~~

an owner of land or any estate or interest in that land when acting with the fee owner's consent.”

SECTION 2. Section 195D-21, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) Except as otherwise provided by law, the board, upon recommendation from the department, in cooperation with other state, federal, county, or private organizations and landowners, after a public hearing on the island affected, and upon an affirmative vote of not less than two-thirds of its authorized membership, may enter into a habitat conservation plan, if it determines that the plan will further the purposes of this chapter by protecting, maintaining, restoring, or enhancing identified ecosystems, natural communities, or habitat types upon which endangered, threatened, proposed, or candidate species depend within the area covered by the plan; that the plan will increase the likelihood of recovery of the endangered or threatened species that are the focus of the plan; and that the plan satisfies all the requirements of this chapter. In the event the board votes to enter into a habitat conservation plan involving public lands for which the majority of the endangered species recovery committee recommended disapproval, the board may not enter into the habitat conservation plan unless the plan is approved by a majority vote of both houses of the legislature. Habitat conservation plans may allow conservation rental agreements, habitat banking, and direct payments. Any habitat conservation plan approved pursuant to this section shall be based on the best available scientific and other reliable data available at the time the plan is approved.

Each habitat conservation plan shall:

- (1) Identify the geographic area encompassed by the plan; the ecosystems, natural communities, or habitat types within the plan area that are the focus of the plan; and the endangered, threatened, proposed, and candidate species known or reasonably expected to be present in those ecosystems, natural communities, or habitat types in the plan area;
- (2) Describe the activities contemplated to be undertaken within the plan area with sufficient detail to allow the department to evaluate the impact of the activities on the particular

ecosystems, natural communities, or habitat types within the plan area that are the focus of the plan;

(3) Identify the steps that will be taken to minimize and mitigate all negative impacts, including without limitation the impact of any authorized incidental take, with consideration of the full range of the species on the island so that cumulative impacts associated with the take can be adequately assessed; and the funding that will be available to implement those steps;

(4) Identify those measures or actions to be undertaken to protect, maintain, restore, or enhance the ecosystems, natural communities, or habitat types within the plan area; a schedule for implementation of the measures or actions; and an adequate funding source to ensure that the actions or measures, including monitoring, are undertaken in accordance with the schedule;

(5) Be consistent with the goals and objectives of any approved recovery plan for any endangered species or threatened species known or reasonably expected to occur in the ecosystems, natural communities, or habitat types in the plan area;

(6) Provide reasonable certainty that the ecosystems, natural communities, or habitat types will be maintained in the plan area, throughout the life of the plan, in sufficient quality, distribution, and extent to support within the plan area those species typically associated with the ecosystems, natural communities, or habitat types, including any endangered, threatened, proposed, and candidate species known or reasonably expected to be present in the ecosystems, natural communities, or habitat types within the plan area;

(7) Contain objective, measurable goals, the achievement of which will contribute significantly to the protection, maintenance, restoration, or enhancement of the ecosystems, natural communities, or habitat types; time frames within which the goals are to be achieved; provisions for monitoring (such as field sampling techniques), including periodic monitoring by representatives of the department or the endangered species recovery committee, or both; and provisions for evaluating progress in achieving the goals quantitatively and qualitatively; and

(8) Provide for an adaptive management strategy that specifies the actions to be taken periodically if the plan is not achieving its goals.”

SECTION 3. Section 195D-22, Hawaii Revised Statutes, is amended by amending subsections (a) and (b) to read as follows:

“(a) To encourage landowners to voluntarily engage in efforts that benefit endangered, threatened, proposed, and candidate species, except as otherwise provided by law, the board, upon approval by not less than two-thirds of the board's authorized membership, after a public hearing on the island affected, may enter into a safe harbor agreement with one or more landowners to create, restore, or improve habitats or to maintain currently unoccupied habitats that threatened or endangered species can be reasonably expected to use, if the board determines that the cumulative activities, if any, contemplated to be undertaken within the areas covered by the agreement are environmentally beneficial. In the event the board votes to enter into a safe harbor agreement involving public lands for which the majority of the endangered species recovery committee recommended disapproval, the board may not enter into the safe harbor agreement unless the agreement is approved by a majority vote of both houses of the legislature. The board shall notify the public of the proposed safe harbor agreement through the periodic bulletin of the office of environmental quality control and make the proposed agreement available for public review and comment not less than sixty days prior to approval.

(b) A safe harbor agreement may authorize the take of an endangered, threatened, proposed, or candidate species incidental to an otherwise lawful activity in or affecting the created, restored, maintained, or improved habitat; provided that based on the best scientific and other reliable data available at the time the safe harbor agreement is approved, if these data are applicable:

(1) The take would not jeopardize the continued existence of any endangered, threatened, proposed, or candidate species;

(2) The take would not reduce the population of endangered, threatened, proposed, or candidate species below the number found on the property prior to entering into the agreement;

(3) The agreement proposes to create, restore, maintain, or improve significant amounts of habitat for a minimum of five years[;] for private lands and for a minimum of fifteen years for public lands;

(4) There is adequate funding for the agreement and the source of that funding is identified;

(5) The safe harbor agreement increases the likelihood that the endangered or threatened species for which a take is authorized will recover;

(6) Any take authorized pursuant to this subsection shall occur only in the habitat created, restored, maintained, or improved; and

(7) The cumulative impact of the activity, which is permitted and facilitated by the take, provides net environmental benefits.”

SECTION 3. Section 195D-23, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) After approval of a habitat conservation plan or safe harbor agreement, or issuance of an incidental take license pursuant to this chapter, no agencies or departments of the State, in order to protect a threatened or endangered species, may impose any new requirements or conditions on, or modify any existing requirements or conditions applicable to, a landowner or successor to the landowner, to mitigate or compensate for changes in the conditions or circumstances of any species or ecosystem, natural community, or habitat covered by the plan, agreement, or license unless:

(1) The landowner, or the landowner's successor, expressly consents to the requirement, condition, or modification;

(2) The board has found, in accordance with those special procedures agreed to by the board and the landowner, or in the absence of any special procedures, in accordance with those procedures that govern the findings generally, that:

(A) The requirement, condition, or modification does not impose any additional restriction on any parcel of land or body of water available for use or development under the plan or agreement; and

(B) The requirement, condition, or modification will not increase the cost to the landowner or other parties to the plan or agreement of implementing the plan or agreement;

(3) The department is prepared to exercise its authority to:

(A) Pay the landowner for the costs of any new requirement or condition or any modification of any existing requirement or condition, which costs may be determined through binding arbitration; and

(B) Take any other action to ensure that any party to the plan or agreement is not, without the party's consent, unduly burdened by the requirement, condition, or modification, in which case

the department shall implement that necessary requirement, condition, or modification upon committing to pay the costs, mitigate the actions, or undertake the action;

(4) The board has revoked the approval of the plan or rescinded the agreement in accordance with section 195D-21(d) or 195D-22(c); or

(8) Extraordinary new circumstances or information indicate that failure to modify the plan or agreement is likely to appreciably reduce the likelihood of the survival or recovery of any threatened or endangered species in its natural habitat. If, on private lands, additional mitigation measures are subsequently deemed necessary to provide for the conservation of a species that was otherwise adequately covered under the terms of a habitat conservation plan, safe harbor agreement, or incidental take license as a result of extraordinary circumstances, the primary obligation for executing mitigation measures shall rest with the State, or the federal government with its consent, and not with the private landowner.”

SECTION 4. Section 195D-24, Hawaii Revised Statutes, is amended to read as follows:

“~~[H]~~**§195D-24**~~[H]~~ **Confidentiality.** All information submitted to the board by a landowner pursuant to section 195D-21 or 195D-22, in the course of preparing a habitat conservation plan or safe harbor agreement~~[;]~~ for private lands, respectively, shall be kept confidential until notice of the proposed plan or agreement is published in the periodic bulletins of the office of environmental quality control. The precise location of any threatened or endangered species may remain confidential.”

Appendix D
Earthjustice Proposal

Earthjustice Proposal

Section 1. Section 195D-2, Hawaii Revised Statutes, is amended by amending the definition of “landowner” to read as follows:

““Landowner” means ~~[the owner of the fee simple interest in private land; and may including public lands limited to the following projects:~~

(1) ~~North South Road, Ewa, Oahu, project no. HWY-0-01-92 as described in the draft environmental assessment, September 1998; and the project described as Kapolei Parkway, Ewa, Oahu, project no. E-13 of the Oahu Regional Transportation Plan adopted by the Oahu metropolitan planning organization on April 6, 2001;~~

(2) ~~Cyanotech Corporation, incidental take permit and habitat conservation plan as described in the Federal Register, January 2, 2002 (volume 67, number 1); and~~

(3) ~~Kealahou planned community proposed by the housing and community development corporation of Hawaii and the department of Hawaiian home lands on lands within tax map key numbers 7-4-8: parcel 17, 7-4-8: portion 12, 7-4-8: parcel 43, and 7-4-19: portion 43.]~~

an owner of land or any estate or interest in that land when acting with the fee owner’s consent.”

Section 2. Section 195D-21, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) Except as otherwise provided by law, the board, upon recommendation from the department, in cooperation with other state, federal, county, or private organizations and landowners, after a public hearing on the island affected, and upon an affirmative vote of not less than two-thirds of its authorized membership, may enter into a habitat conservation plan, if it determines that the plan will further the purposes of this chapter by protecting, maintaining, restoring, or enhancing identified ecosystems, natural communities, or habitat types upon which endangered, threatened, proposed, or candidate species depend within the area covered by the plan; that the plan will increase the likelihood of recovery of the endangered or threatened species that are the focus of the plan; and that the plan satisfies all the requirements of this chapter. In the event the board votes to enter into a habitat conservation plan for which the majority of the endangered species recovery committee recommended disapproval, the board may not enter into the habitat conservation plan unless the plan is approved by a majority vote of both houses of the legislature. Habitat conservation plans may allow conservation rental agreements, habitat banking, and direct payments. Any habitat conservation plan approved pursuant to this section shall be based on the best available scientific and other reliable data available at the time the plan is approved.

Each habitat conservation plan shall:

(1) Identify the geographic area encompassed by the plan; the ecosystems, natural communities, or habitat types within the plan area that are the focus of the plan; and the endangered, threatened, proposed, and candidate species known or reasonably expected to be present in those ecosystems, natural communities, or habitat types in the plan area;

(2) Describe the activities contemplated to be undertaken within the plan area with sufficient detail to allow the department to evaluate the impact of the activities on the particular ecosystems, natural communities, or habitat types within the plan area that are the focus of the plan;

- (3) Identify the steps that will be taken to minimize and mitigate all negative impacts, including without limitation the impact of any authorized incidental take, with consideration of the full range of the species on the island so that cumulative impacts associated with the take can be adequately assessed; and the funding that will be available to implement those steps;
- (4) Identify those measures or actions to be undertaken to protect, maintain, restore, or enhance the ecosystems, natural communities, or habitat types within the plan area; a schedule for implementation of the measures or actions; and an adequate funding source to ensure that the actions or measures, including monitoring, are undertaken in accordance with the schedule;
- (5) Be consistent with the goals and objectives of any approved recovery plan for any endangered species or threatened species known or reasonably expected to occur in the ecosystems, natural communities, or habitat types in the plan area;
- (6) Provide reasonable certainty that the ecosystems, natural communities, or habitat types will be maintained in the plan area, throughout the life of the plan, in sufficient quality, distribution, and extent to support within the plan area those species typically associated with the ecosystems, natural communities, or habitat types, including any endangered, threatened, proposed, and candidate species known or reasonably expected to be present in the ecosystems, natural communities, or habitat types within the plan area;
- (7) Contain objective, measurable goals, the achievement of which will contribute significantly to the protection, maintenance, restoration, or enhancement of the ecosystems, natural communities, or habitat types; time frames within which the goals are to be achieved; provisions for monitoring (such as field sampling techniques), including periodic monitoring by representatives of the department or the endangered species recovery committee, or both; and provisions for evaluating progress in achieving the goals quantitatively and qualitatively; and
- (8) Provide for an adaptive management strategy that specifies the actions to be taken periodically if the plan is not achieving its goals.”

Section 3. Section 195D-22, Hawaii Revised Statutes, is amended by amending subsections (a) and (b) and by adding a new subsection (e) to read as follows:

“(a) To encourage landowners to voluntarily engage in efforts that benefit endangered, threatened, proposed, and candidate species, except as otherwise provided by law, the board, upon approval by not less than two-thirds of the board's authorized membership, after a public hearing on the island affected, may enter into a safe harbor agreement with one or more landowners to create, restore, or improve habitats or to maintain currently unoccupied habitats that threatened or endangered species can be reasonably expected to use, if the board determines that the cumulative activities, if any, contemplated to be undertaken within the areas covered by the agreement are environmentally beneficial. In the event the board votes to enter into a safe harbor agreement for which the majority of the endangered species recovery committee recommended disapproval, the board may not enter into the safe harbor agreement unless the agreement is approved by a majority vote of both houses of the legislature. The board shall notify the public of the proposed safe harbor agreement through the periodic bulletin of the office of environmental quality control and make the proposed agreement available for public review and comment not less than sixty days prior to approval.

(b) A safe harbor agreement may authorize the take of an endangered, threatened, proposed, or candidate species incidental to an otherwise lawful activity in or affecting the created, restored, maintained, or improved habitat; provided that based on the best scientific and other reliable data available at the time the safe harbor agreement is approved, if these data are applicable:

- (1) The take would not jeopardize the continued existence of any endangered, threatened, proposed, or candidate species;
- (2) The take would not reduce the population of endangered, threatened, proposed, or candidate species below the number found on the property prior to entering into the agreement;
- (3) The agreement proposes to create, restore, maintain, or improve significant amounts of habitat for a minimum of five years for private lands and for a minimum of fifteen years for public lands;
- (4) There is adequate funding for the agreement and the source of that funding is identified;
- (5) The safe harbor agreement increases the likelihood that the endangered or threatened species for which a take is authorized will recover;
- (6) Any take authorized pursuant to this subsection shall occur only in the habitat created, restored, maintained, or improved; and
- (7) The cumulative impact of the activity, which is permitted and facilitated by the take, provides net environmental benefits.”

Section 4. Section 195D-23, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) After approval of a habitat conservation plan or safe harbor agreement, or issuance of an incidental take license pursuant to this chapter, no agencies or departments of the State, in order to protect a threatened or endangered species, may impose any new requirements or conditions on, or modify any existing requirements or conditions applicable to, a landowner or successor to the landowner, to mitigate or compensate for changes in the conditions or circumstances of any species or ecosystem, natural community, or habitat covered by the plan, agreement, or license unless:

- (1) The landowner, or the landowner's successor, expressly consents to the requirement, condition, or modification;
- (2) The board has found, in accordance with those special procedures agreed to by the board and the landowner, or in the absence of any special procedures, in accordance with those procedures that govern the findings generally, that:
 - (A) The requirement, condition, or modification does not impose any additional restriction on any parcel of land or body of water available for use or development under the plan or agreement; and
 - (B) The requirement, condition, or modification will not increase the cost to the landowner or other parties to the plan or agreement of implementing the plan or agreement;
- (3) The department is prepared to exercise its authority to:
 - (A) Pay the landowner for the costs of any new requirement or condition or any modification of any existing requirement or condition, which costs may be determined through binding arbitration; and
 - (B) Take any other action to ensure that any party to the plan or agreement is not, without the party's consent, unduly burdened by the requirement, condition, or modification, in which case the department shall implement that necessary requirement, condition, or modification upon committing to pay the costs, mitigate the actions, or undertake the action;
- (4) The board has revoked the approval of the plan or rescinded the agreement in accordance with section 195D-21(d) or 195D-22(c); or
- (5) Extraordinary new circumstances or information indicate that failure to modify the plan or agreement is likely to appreciably reduce the likelihood of the survival or recovery of any

threatened or endangered species in its natural habitat. [If additional mitigation measures are subsequently deemed necessary to provide for the conservation of a species that was otherwise adequately covered under the terms of a habitat conservation plan, safe harbor agreement, or incidental take license as a result of extraordinary circumstances, the primary obligation for executing mitigation measures shall rest with the State, or the federal government with its consent, and not with the landowner.]”

Section 5. Section 195D-24, Hawaii Revised Statutes, is amended to read as follows:

“All information submitted to the board by a landowner pursuant to section 195D-21 or 195D-22, in the course of preparing a habitat conservation plan or safe harbor agreement for private lands, respectively, shall be kept confidential until notice of the proposed plan or agreement is published in the periodic bulletins of the office of environmental quality control. For habitat conservation plans or safe harbor agreements for private lands, the [The] precise location of any threatened or endangered species may remain confidential.”

Section 6. Section 195D-25, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) The endangered species recovery committee shall:

- (1) Review all applications and proposals for habitat conservation plans, safe harbor agreements, and incidental take licenses and make recommendations, based on a full review of the best available scientific and other reliable data and at least one site visit to each property that is the subject of the proposed action, and in consideration of the cumulative impacts of the proposed action on the recovery potential of the endangered, threatened, proposed, or candidate species, to the department and the board as to whether or not they should be approved, amended, or rejected;
- (2) Review all habitat conservation plans, safe harbor agreements, and incidental take licenses on an annual basis to ensure compliance with agreed to activities and, on the basis of any available monitoring reports, and scientific and other reliable data, make recommendations for any necessary changes;
- (3) Consider and recommend appropriate incentives to encourage landowners to voluntarily engage in efforts that restore and conserve endangered, threatened, proposed, and candidate species;
- (4) Perform such other duties as provided in this chapter;
- (5) Consult with persons possessing expertise in such areas as the committee may deem appropriate and necessary in the course of exercising its duties; [and]
- (6) Not conduct more than one site visit per year to each property that is the subject of a habitat conservation plan, safe harbor agreement or incidental take license.”

Section 7. Chapter 195D, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“**§195D- Citizen suits.** (a) Except as provided in subsection (b), any person, acting as a private attorney general, may commence a civil suit on the person’s behalf:

- (1) Against any State or County agency or instrumentality that is alleged to be in violation of this chapter or any rule adopted pursuant to this chapter; or

(2) Against the department or board, where there is alleged a failure of the department or board to perform any act or duty required under this chapter or any rule adopted pursuant to this chapter.

(b) The circuit courts shall have jurisdiction to enforce this chapter or any rule adopted pursuant to this chapter, or to order the department or board to perform any act or duty required under this chapter or any rule adopted pursuant to this chapter, provided that:

(1) No action may be commenced under subsection (a)(1) less than sixty days after written notice of the alleged violation has been given to the department, and to the State or County agency or instrumentality alleged to be in violation of this chapter or any rule adopted pursuant to this chapter, except that the action may be brought immediately after the notification in the case of an emergency posing a significant risk to the well-being of any species of fish or wildlife, or plants; and

(2) No action may be commenced under subsection (a)(2) less than sixty days after written notice of the alleged violation has been given to the department, except that the action may be brought immediately after the notification in the case of an emergency posing a significant risk to the well-being of any species of fish or wildlife, or plants.

(c) Any suit brought pursuant to this section may be brought in the judicial circuit where the alleged violation occurred or is occurring. In any suit brought pursuant to this section, where the State is not a party, the attorney general, at the request of the department, may intervene on behalf of the State as a matter of right.

(d) The injunctive relief provided by this section shall not restrict any right that any person or class or persons may have under any other law, including common law, to seek enforcement of any standard or limitation or to seek any other relief, including relief against any instrumentality or agency of the State.”

Appendix E
Department of Land and Natural Resources Proposal

Department of Land and Natural Resources Proposal

SECTION 1. Section 195D-2, Hawaii Revised Statutes, is amended by adding a new definition of “government-owned lands” to read as follows:

““Government-owned lands” means lands owned by the State or any agency thereof, or lands owned by any political subdivision of the State.”

SECTION 2. Section 195D-2, Hawaii Revised Statutes, is amended by amending the definition of “landowner” to read as follows:

~~““Landowner” means [the owner of the fee simple interest in private land and may include public lands limited to the following projects:~~

~~(1) North-South Road, Ewa, Oahu, project no. HWY-0-01-92 as described in the draft environmental assessment, September 1998; and the project described as Kapolei Parkway, Ewa, Oahu, project no. E-13 of the Oahu Regional Transportation Plan adopted by the Oahu metropolitan planning organization on April 6, 2001;~~

~~(2) Cyanotech Corporation, incidental take permit and habitat conservation plan as described in the Federal Register, January 2, 2002 (volume 67, number 1); and~~

~~(3) Kealahou planned community proposed by the housing and community development corporation of Hawaii and the department of Hawaiian home lands on lands within tax map key numbers 7-4-8: parcel 17, 7-4-8: portion 12, 7-4-8: parcel 43, and 7-4-19: portion 43.]~~

an owner of land or any estate or interest in that land when acting with the fee owner's consent.”

SECTION 2. Section 195D-21, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) Except as otherwise provided by law, the board, upon recommendation from the department, in cooperation with other state, federal, county, or private organizations and landowners, after a public hearing on the island affected, and upon an affirmative vote of not less than two-thirds of its authorized membership, may enter into a habitat conservation plan, if it determines that the plan will further the purposes of this chapter by protecting, maintaining, restoring, or enhancing identified ecosystems, natural communities, or habitat types upon which endangered, threatened, proposed, or candidate species depend within the area covered by the plan; that the plan will increase the likelihood of recovery of the endangered or threatened species that are the focus of the plan; and that the plan satisfies all the requirements of this chapter. If a majority of the members of the endangered species recovery committee recommends disapproval of a habitat conservation plan involving government-owned lands, the board may vote to enter into the habitat conservation plan, but entering into the plan shall be subject to legislative disapproval in the next regular or special session of the legislature. Habitat conservation plans may allow conservation rental agreements, habitat banking, and direct payments. Any habitat conservation plan approved pursuant to this section shall be based on the best available scientific and other reliable data available at the time the plan is approved.

Each habitat conservation plan shall:

(1) Identify the geographic area encompassed by the plan; the ecosystems, natural communities, or habitat types within the plan area that are the focus of the plan; and the

endangered, threatened, proposed, and candidate species known or reasonably expected to be present in those ecosystems, natural communities, or habitat types in the plan area;

(2) Describe the activities contemplated to be undertaken within the plan area with sufficient detail to allow the department to evaluate the impact of the activities on the particular ecosystems, natural communities, or habitat types within the plan area that are the focus of the plan;

(3) Identify the steps that will be taken to minimize and mitigate all negative impacts, including without limitation the impact of any authorized incidental take, with consideration of the full range of the species on the island so that cumulative impacts associated with the take can be adequately assessed; and the funding that will be available to implement those steps;

(4) Identify those measures or actions to be undertaken to protect, maintain, restore, or enhance the ecosystems, natural communities, or habitat types within the plan area; a schedule for implementation of the measures or actions; and an adequate funding source to ensure that the actions or measures, including monitoring, are undertaken in accordance with the schedule;

(5) Be consistent with the goals and objectives of any approved recovery plan for any endangered species or threatened species known or reasonably expected to occur in the ecosystems, natural communities, or habitat types in the plan area;

(6) Provide reasonable certainty that the ecosystems, natural communities, or habitat types will be maintained in the plan area, throughout the life of the plan, in sufficient quality, distribution, and extent to support within the plan area those species typically associated with the ecosystems, natural communities, or habitat types, including any endangered, threatened, proposed, and candidate species known or reasonably expected to be present in the ecosystems, natural communities, or habitat types within the plan area;

(7) Contain objective, measurable goals, the achievement of which will contribute significantly to the protection, maintenance, restoration, or enhancement of the ecosystems, natural communities, or habitat types; time frames within which the goals are to be achieved; provisions for monitoring (such as field sampling techniques), including periodic monitoring by representatives of the department or the endangered species recovery committee, or both; and provisions for evaluating progress in achieving the goals quantitatively and qualitatively; and

(8) Provide for an adaptive management strategy that specifies the actions to be taken periodically if the plan is not achieving its goals.”

SECTION 3. Section 195D-22, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) To encourage landowners to voluntarily engage in efforts that benefit endangered, threatened, proposed, and candidate species, except as otherwise provided by law, the board, upon approval by not less than two-thirds of the board's authorized membership, after a public hearing on the island affected, may enter into a safe harbor agreement with one or more landowners to create, restore, or improve habitats or to maintain currently unoccupied habitats that threatened or endangered species can be reasonably expected to use, if the board determines that the cumulative activities, if any, contemplated to be undertaken within the areas covered by the agreement are environmentally beneficial. If a majority of the members of the endangered species recovery committee recommends disapproval of a safe harbor agreement involving government-owned lands, the board may vote to enter into the safe harbor agreement, but entering into the agreement shall be subject to legislative disapproval in the next regular or

special session of the legislature. The board shall notify the public of the proposed safe harbor agreement through the periodic bulletin of the office of environmental quality control and make the proposed agreement available for public review and comment not less than sixty days prior to approval.”

SECTION 4. Section 195D-23, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) After approval of a habitat conservation plan or safe harbor agreement, or issuance of an incidental take license pursuant to this chapter, no agencies or departments of the State, in order to protect a threatened or endangered species, may impose any new requirements or conditions on, or modify any existing requirements or conditions applicable to, a landowner or successor to the landowner, to mitigate or compensate for changes in the conditions or circumstances of any species or ecosystem, natural community, or habitat covered by the plan, agreement, or license unless:

- (1) The landowner, or the landowner's successor, expressly consents to the requirement, condition, or modification;
- (2) The board has found, in accordance with those special procedures agreed to by the board and the landowner, or in the absence of any special procedures, in accordance with those procedures that govern the findings generally, that:
 - (A) The requirement, condition, or modification does not impose any additional restriction on any parcel of land or body of water available for use or development under the plan or agreement; and
 - (B) The requirement, condition, or modification will not increase the cost to the landowner or other parties to the plan or agreement of implementing the plan or agreement;
- (3) The department is prepared to exercise its authority to:
 - (A) Pay the landowner for the costs of any new requirement or condition or any modification of any existing requirement or condition, which costs may be determined through binding arbitration; and
 - (B) Take any other action to ensure that any party to the plan or agreement is not, without the party's consent, unduly burdened by the requirement, condition, or modification, in which case the department shall implement that necessary requirement, condition, or modification upon committing to pay the costs, mitigate the actions, or undertake the action;
- (4) The board has revoked the approval of the plan or rescinded the agreement in accordance with section 195D-21(d) or 195D-22(c); or
- (5) Extraordinary new circumstances or information indicate that failure to modify the plan or agreement is likely to appreciably reduce the likelihood of the survival or recovery of any threatened or endangered species in its natural habitat. If, on private lands, additional mitigation measures are subsequently deemed necessary to provide for the conservation of a species that was otherwise adequately covered under the terms of a habitat conservation plan, safe harbor agreement, or incidental take license as a result of extraordinary circumstances, the primary obligation for executing mitigation measures shall rest with the State, or the federal government with its consent, and not with the private landowner.”

SECTION 5. Section 195D-24, Hawaii Revised Statutes, is amended to read as follows:

“[§195D-24] **Confidentiality.** All information submitted to the board by a landowner pursuant to section 195D-21 or 195D-22, in the course of preparing a habitat conservation plan or safe harbor agreement[;] for private lands, respectively, shall be kept confidential until notice of the proposed plan or agreement is published in the periodic bulletins of the office of environmental quality control. The precise location of any threatened or endangered species may remain confidential.”